IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 304

NORTHWEST AIRLINES, INC.,

*Petitioner,*

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, DAVID G. BALL and R. E. LEE,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT


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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

### Question Presented

In a suit for enforcement against an airline of a non-money award duly rendered by a System Board of Adjustment created pursuant to §204 of the Railway Labor Act by an agreement between the airline and the union, which agreement provides that the Board's award is to be final, binding, and conclusive upon the parties, must the airline be accorded a *de novo* determination by the District Court of the merits of the dispute?

### Statement of Case

Petitioner's statement of the case is unacceptable, as it contains irrelevant matters and argument and is incomplete.

On February 8, 1964, Northwest Airlines, Inc. (NWA) discharged pilots David G. Rall and R. E. Lee; Rall for violation of a rule prohibiting use of alcoholic beverages within 24 hours before flying as a crew member, and Lee for flying as a second pilot with Rall while the latter had an apparent physical deficiency (R. 18, 22).

Rall and Lee disputed their discharges, processing their grievances through the procedures established by contract between NWA and the Air Line Pilots Association (ALPA), each ultimately appealing to a five-man System Board of Adjustment established under contract provisions between NWA and ALPA pursuant to §204 of the Railway Labor Act, 49 Stat. 1189 (1936), 45 U.S.C. §184, which provides in relevant part:

> "It shall be the duty of every carrier and of its employees, * * * to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title."

The agreement between NWA and ALPA (R. 5-11) provides that in compliance with the section just quoted, "there is hereby established a System Board of Adjustment for the purpose of adjusting and deciding disputes which may arise under the terms of the Pilot's Agreement and which are properly submitted to it" (R. 5). It further provides:

> "(l) Decisions of the Board in all cases properly referable to it shall be final and binding upon the parties hereto.
>
> "(m) * * * a majority vote of the Board shall be final, binding, and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute" (R. 9).

The Railway Labor Act, §3, First, 48 Stat. 1189 (1934), 45 U.S.C. §153, First (prior to Amendments, 80 Stat. 208 (1966)), provided in relevant part:

> "(m) * * * [T]he awards [of the Adjustment Board] shall be final and binding upon both parties to a dispute, except insofar as they shall contain a money award * * *."
>
> * * * * *
>
> "(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner * * * may file in the District Court * * * a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated * * *."

In each case, the Board duly heard and considered the evidence (R. 79-695), determined that discharge was too severe a sanction under the circumstances, and ordered reinstatement (R. 20, 23).

NWA refused to comply with these orders; accordingly, on February 10, 1965, ALPA, Rall and Lee petitioned the United States District Court to enforce them (R. 1). On January 6, 1966, they moved for summary judgment (R. 62)[1], which was granted on March 7, 1966 (R. 63). This action was affirmed by the Court of Appeals for the Eighth Circuit on February 23, 1967, 373 F. 2d 136, Peti-

1. This was the second motion for summary judgment. The first, filed April 6, 1965, (R. 33), was denied on August 6, 1965 (R. 46), and leave to take an interlocutory appeal from such denial was denied by the Court of Appeals on October 13, 1965 (R. 59).

tion Appendix A 47, and NWA's petition for a rehearing was denied on March 30, 1967. NWA seeks from this Court a writ of certiorari.

NWA's position in the courts was that, notwithstanding the clear language of the agreement that the Board's decision was to be "final, binding and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute" (R. 9), it should be accorded a *de novo* hearing on the dispute in District Court. Essentially, NWA argues for *de novo* trial because §204 of the Railway Labor Act provides that the Board's jurisdiction not exceed that provided for boards operating under the authority of §3 of the same act, and §3, in addition to providing that the board's decision "shall be final and binding upon both parties" (§3, First (m)), provides that a suit for compliance in District Court "shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated * * *." (§3, First, (p).) See District Court opinion (R. 67). In sum, NWA has urged that to give the agreement literal construction would be to violate the requirement of §204 that the Board's jurisdiction not exceed that provided in §3. It has made no other real claim.

# ARGUMENT

## Introductory Statement

Certiorari should be denied because none of the reasons for reviewal on a writ of certiorari enumerated in Supreme Court Rule 19 are present:

> (1) The Court of Appeals has not rendered a decision in conflict with the decision in another court of appeals on the same matter. Rather, it has rendered one in accord with all the decisions of the courts of appeals (and district courts) rendered subsequently to the controlling decision by this Court, *Gunther* v. *San Diego & A. E. Ry.* 382 U. S. 257 (1965).
>
> (2) The Court of Appeals has not decided an important question of federal law which has not been, but should be, settled by this Court. Rather, it has followed the decision of this Court in *Gunther* v. *San Diego & A. E. Ry., supra.*
>
> (3) The Court of Appeals has not decided a federal question in conflict with applicable decisions of this Court. Rather, it has followed such decisions.[2]

Briefly stated, Respondents' positions are that:

> 1. The federal question was not decided in conflict with applicable decisions of this Court.
>
> (2) The federal question (a) has been settled by decisions of this Court; or if it has not been settled, (b) it is not an important question of federal law;

2. Petitioner does not claim that the Court of Appeals "has decided an important state or territorial question in a way in conflict with applicable state or territorial law" or that it "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

and/or (c) it need not and should not be treated by this Court at this time.

3. There is presently no conflict between any courts of appeal as to the federal question.

**1. Extraneous matters included in Petition becloud the real issue herein.**

It is essential to clarity that several matters be disposed of at the outset. The first is Petitioner's claim that the District Court and the Court of Appeals herein determined the question of the finality of the Board's award "not on the basis of the contract between the parties, but on the basis of an interpretation of §3 of the Railway Labor Act." This claim appears at various places in the petition.[3]

Petitioner's claim that the District Court and the Court of Appeals paid no heed to the effect of the agreement are without the slightest merit. The District Court opinion states as follows:

> "Neither is there any showing which would justify a finding that the Air Line Pilots Association and the Northwest Airlines contracted with each other in the belief and understanding that the decisions of the Board would not be complete and irrevocable. It may be noted that the contract between Northwest Airlines and the Air Line Pilots Association provided that the System Board of Adjustment's decisions shall be final and binding" (R. 68).

The Court of Appeals opinion states as follows:

> "The agreement provides that a decision can be made by a majority of the Board members and that

3. See Petition 6, 15, 16-17; c.f. Petition 13 (assertion that contractual provisions broadening scope of judicial review are permissible under *Gunther*).

the Board's decision on matters properly referable to it 'shall be final and binding upon the parties.' * * *

* * * * *

"In our present case, the award was made by a System Adjustment Board created by contract pursuant to statutory authority found in 45 U.S.C.A. §185. Under the latter section airline employees and labor representatives are authorized and directed to establish by contract System Boards of Adjustment having jurisdiction not exceeding that of §153 boards. It is conceded that jurisdiction equal to that of §153 boards may be established.

"As heretofore pointed out, the contract creating the System Board is broad and provides for the finality of Board rulings" (Petition Appendix A 40, 43).[4]

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4. Petitioner argues that the language of the agreement "was selected in the light of the then known NRAB 'degree of finality' decisions, viz. *nine* pre-1952 cases interpreting §3 of the Act as requiring a full *de novo* review of NRAB awards." Petition 26. This argument certainly is inconsistent with its claim that §3 is "expressly inapplicable" to air carriers (see Petition 6, 10, 11, 16, 27). Moreover, it is utterly without merit.

First, it should be pointed out that, as shown in the discussion in §3 of this brief, *infra*, there are not nine pre-1952 cases holding that §3 requires a *de novo* review of NRAB awards. Prior to 1952, there were two Court of Appeals cases affirming denials of enforcement on the basis of a full *de novo* review and four district court cases according the employer *de novo* review. In the district court cases, the holdings were far from crucial—in three of them the employee received all of the benefits conferred by the award, and in the other, the ruling was made in a pre-trial order, so that it is not apparent whether the employee received all the benefits sought. None of the decisions was by the Court of Appeals for the Eighth Circuit or the District Court for the District of Minnesota.

Secondly, it is plain that if the parties contemplated that *de novo* review was to be possible, they would have said so, rather than agreeing that awards be "final and binding upon the *parties* hereto." [Emphasis supplied.]

All of this compels the conclusion that the Court of Appeals herein was absolutely correct when it stated:

> "As heretofore pointed out, the contract creating the System Board is broad and provides for the finality of Board rulings.

Related to the foregoing is another barrier to clarity which must be removed in order to see the real issue. Petitioner recurrently refers to §3 being "expressly made inapplicable to carriers by air." See Petition 6, 10, 11, 16, 27. The provision it uses in support of that statement does not state that §3 of the Railway Labor Act, (45 U.S.C. §153) is inapplicable to air carriers, but rather that certain other provisions *are* applicable.[5] As noted above, §204 of the Railway Labor Act, under which the Board herein was created by agreement, provides that such a board shall have "jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group or regional boards of adjustment, under the authority of Section 153 of this title." This unequivocally makes §3 of the Act applicable to §204 boards for the purpose of determining whether their jurisdiction exceeds that of §3 boards.

Still another beclouding matter, related to those just mentioned, is presented by Petitioner's references to some type of imagined, but unarticulated, difference between air carrier boards and railroad boards.

At page 13 of the petition it is contended that "until NATAB [National Air Transport Adjustment Board,

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NWA argues that prior to *Gunther de novo* review existed under the circumstances here presented and that the parties by their contract could give the Board no greater power than existed by law in a §153 Board. We believe such argument is based on a false premise. *Gunther* interprets the statutory law as it has at all times here materially existed and does not purport to change any previous authoritative Supreme Court decision interpreting the statutory provisions with respect to the scope of review of a board's nonmonetary award" (Petition Appendix A 40, 43).

5. "All of the provisions of Sections 151, 152 and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce * * *" Railway Labor Act, §201, 49 Stat. 1189 (1926), 45 U.S.C. §181.

authorized by §205 of the Railroad Labor Act, 49 Stat. 1190 (1936), 45 U.S.C. 185] is created, Airline System Boards may have decisional finality power of a lesser degree than NATAB." Section 205 does provide that NATAB, when created, shall have the power and duties prescribed by §3 for the National Railroad Adjustment Board. But §204 provides that boards such as that in the present case shall have jurisdiction "not exceeding" that provided in §3, and the agreement herein provides for jurisdiction to the limits of §3.

In a similar vein, Petitioner cites ten cases decided in the courts of appeal and district courts for the proposition that there is confusion surrounding the issue of the finality to be accorded awards of airline system boards. See Petition 8 n. 9, n. 10. None of these decisions contains the slightest indication that airline boards are to be treated in any way differently from railroad adjustment boards. Moreover, despite the fact that all the cases cited preceded *Gunther*, they do not indicate any confusion as to the question in the present case. The simple reason for this is that nine of them do not *involve* the present question, and the one decision which *does* involve the point determines it adversely to Petitioner's position.

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6. Five of the cases hold that an employee cannot appeal the merits of an adverse Board decision. *Woolley* v. *Eastern Airlines, Inc.*, 250 F. 2d 86 (5th Cir. 1957), *cert. den.* 356 U. S. 931 (1958); *Sigfred* v. *Pan American World Airways, Inc.*, 230 F. 2d 13 (5th Cir. 1956), *cert. den.* 351 U. S. 925 (1956); *Bower* v. *Eastern Airlines, Inc.*, 214 F. 2d 623 (3d Cir. 1954), *cert. den.* 348 U. S. 871 (1954); *Hartley* v. *Pan American Airways, Inc.*, 98 F. Supp. 247 (N.D. Cal. 1951); *Farris* v. *Alaska Airlines, Inc.*, 113 F. Supp. 907 (W.D. Wash. 1953). In *Edwards* v. *Capital Airlines, Inc.*, 176 F. 2d 755 (D. C. Cir. 1949), *cert. den.* 338 U. S. 885 (1949), the court held that *employees* who are not members of the union might not be completely bound by the Board award where the union, which is represented on the Board, has an interest hostile to such employees and the company, also represented on the Board, is neutral on the matter. In *American Airlines, Inc.* v. *Air Line Pilots Assn.*, 91 F. Supp. 629 (E.D.N.Y. 1950), a carrier was denied summary

In *Capitol Airways, Inc.* v. *Airline Pilots Association,* 341 F. 2d 288 (6th Cir. 1965), *cert. den.* 381 U. S. 913, 952 (1965), the court rejected the propriety of the district court's making a *de novo* determination and held that the award is to be enforced if the collective bargaining agreement is susceptible of the interpretation placed upon it by the Board. Petitioner's attempt to fault the decision on the ground that the court "confused System Boards with Boards of Arbitration" (Petition 9) is certainly hollow in light of this Court's statement in *Gunther* that the board decision is to have "the same finality that a decision of arbitrators would have," and that "the Adjustment Board provisions were to be considered as 'compulsory arbitration in this limited field.' " 382 U. S. at 263-64.

The agreement between Petitioner and ALPA provided for jurisdiction to the full extent of §3 of the Railway Labor Act. Both were created pursuant to provisions of the Railway Labor Act, the purpose of which regarding "minor" disputes of the type here involved is "to provide for the prompt and orderly settlement" thereof. Railway Labor Act, §2, 44 Stat. 577 (1926), 45 U.S.C. 151a. The possible effect of some awards upon safety is present in regard to both, and there is no reason to doubt that both boards weigh the "safety factor" carefully.

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judgment because there was a question of fact as to the meaning of the Board's decision. In only two of the suits was the employee seeking enforcement unsuccessful, and in each one it was for a reason completely unrelated to the present question. In *Bates* v. *Northwest Airlines, Inc.,* 171 F. Supp. 273 (D. Minn. 1959), the employee failed because there was no board order directed to the employer commanding it to make payment. In *Arnold* v. *United Airlines, Inc.,* 296 F. 2d 191 (7th Cir. 1961), it was because the board lacked jurisdiction because the appeal to it had not been timely.

**2. The federal question herein was not decided in conflict with applicable decisions of this Court.**

Putting aside for the moment the fundamental fact that the federal question herein was settled by this Court in *Gunther* v. *San Diego & Arizona E. Ry. Co.*, 382 U. S. 257 (1965), it is abundantly clear that the Court of Appeals' decision is not in conflict with any decision of this Court.

Petitioner by tortuous reasoning attempts to show that the decision conflicts with *International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963). Petitioner posits a strange argument that the meaning of *Central Airlines* is unclear, and that whatever the meaning of that case is, the District Court and the Court of Appeals below did not follow it (Petition 16). This argument is plainly fallacious. There is no ambiguity in the *Central Airlines* case, and the District Court and the Court of Appeals herein completely followed it. This Court unequivocally held in *Central Airlines* that an agreement made pursuant to §204 of the Railway Labor Act, the relevant words of which were *identical* to those of the agreement involved herein, *compare* 372 U. S. at 683, *with* R. 5, 9, was "a federal contract and is therefore governed and enforceable by federal law, in the federal courts," 372 U. S. at 692, and that "it is federal law which would determine whether a §204 contract is valid and enforceable according to its terms." 372 U. S. at 691. The District Court and the Court of Appeals merely carried out the mandate of this Court that such a contract is a federal contract and that the courts' function was to determine whether it was enforceable according to its terms.

Petitioner states that the court in *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (D.C. Cir. 1941), *aff'd by an*

*equally divided court,* 319 U. S. 732 (1943), held that a district court must conduct a *de novo* review of an award of a Railroad Adjustment Board. (Petition 18) It held no such thing, as is abundantly clear from the court's own statement:

> "[T]he issue is whether a carrier, which has been unsuccessful before the Board, can maintain a suit for a declaratory judgment of rights under the original collective [bargaining] agreement during the two years which the Act allows for the employee's enforcement suit. We think the answer should be negative, and therefore the District Court was right in dismissing the complaint of the carrier, appellant here." 124 F. 2d 238.

The court so held because allowing the company in such a situation to bring a declaratory judgment action would rob the employees of the effect of the Board determination. It was not necessary for the court to decide precisely what the effect of the Board determination was, but only to decide, as it did, that the award did have legal effect. The *Washington Terminal* opinion did contain dicta as to the precise effect of the Board determination. But such dicta certainly cannot be considered approved by the equally divided memorandum affirmance in this Court.[7]

It is completely unnecessary at present to reconsider the question of whether the employees could have chosen to proceed by means of the state courts rather than through the procedures culminating in the Board decision. See *Transcontinental & Western Air, Inc.* v. *Koppal,* 345 U. S. 653 (1953); *Moore* v. *Illinois Central R. R.,* 312 U. S. 630

7. Where a decision is affirmed by an equally divided court, the judgment is without force as precedent. *Ohio ex rel. Eaton* v. *Price,* 264 U. S. 263, 264 (Opinion of Brennan, J.).

(1941); *Walker* v. *Southern Ry.*, 385 U. S. 196 (1966). The employees chose the latter course. The reason there should be a difference in the scope of matters considered by the trial court in a suit for wrongful discharge and in one for enforcement of a Board order is obvious—this result is required by the agreement which was made pursuant to §204 of the Railway Labor Act. There is nothing "confusing" (Petition 13) about this at all.

Petitioner contends that Railway Labor Act, unlike the Interstate Commerce Act, provided the same method of enforcement of both money and non-money awards (Petition 21). This assertion was fully answered by this Court in *Gunther*, in holding that §3 of the Railway Labor Act dictates that "though the Board's finding on the merits of the wrongful discharge must be accepted by the District Court, it has power under the Act to determine the size of the money award." 382 U. S. at 264.

In *Brotherhood of Locomotive Engineers* v. *Louisville & N.R.R.*, 373 U. S. 33 (1966), this Court clearly showed that it had not yet considered the problem here involved, and presaged *Gunther*. This Court held that money awards could be reviewed, and stated, "We do not deal here with non-money awards, which are made 'final and binding' by §3 First (m)." 373 U. S. at 40.

Petitioner posits as a reason for review of this case that *Gunther* has been erroneously applied by the courts—thus adhering to its tortured refusal to believe the clear impact of *Gunther* and claiming that all the federal courts facing the question since *Gunther* are wrong in their interpretation of *Gunther*, and that it alone is right.

Petitioner cites as the "several courts" it fears are misguided: *Hanson* v. *Chesapeake & O. Ry.*, 367 F. 2d 134 (4th Cir. 1966); *Hodges* v. *Atlantic Coast L.R.R.*, 363 F. 2d

534 (5th Cir. 1966); *Taylor* v. *Hudson Rapid Tubes Corp.*, 362 F. 2d 748 (3d Cir. 1966); *Brotherhood of R.R. Signalmen* v. *Southern Ry.*, 254 F. Supp. 564 (M.D.N.C. 1966); and *Barrett* v. *Manufacturers Ry.*, 254 F. Supp. 376 (E.D. Mo. 1966). All of these cases held that an employer is not entitled to a *de novo* determination in a suit to enforce a non-money award. Petitioner has neglected to mention that the first case cited, *Hanson,* was decided upon summary remand from this Court. See 384 U. S. 211 (1966), *vacating and remanding* 351 F. 2d 953 (1965). In accord with the foregoing cases are the following additional cases: *Raabe* v. *Florida East Coast Ry.*, 259 F. Supp. 351 (M.D. Fla. 1966); *Brotherhood of R.R. Signalmen of America* v. *Southern Ry.*, 254 F. Supp. 569 (M.D.N.C. 1966). No post-*Gunther* case even *suggesting* a contrary result has been found.

Nor do the courts facing disparate problems which cite *Gunther* appear to have any difficulty in determining its meaning. *Leeds & Northrop Co.* v. *NLRB,* 357 F. 2d 527, 532 (3d Cir. 1966) ("There are, of course, certain instances when definitive administrative action is final and not within the ambit of judicial review"); *St. Regis Paper Co.* v. *Jackson,* 369 F. 2d 136, 142 n. 13 (5th Cir. 1966) ("Curtailment of the right of review has been upheld in at least one other area of the law,where there were justifiable reasons for the curtailment"); *In re Certain Carriers,* 253 F. Supp. 523, 534 (D.D.C. 1966) ("Only recently the Supreme Court held that an award of the National Adjustment Board is not only final and binding but may be enforced judicially").

**3. (a) The federal question herein has been settled by decision of this Court.**

*Gunther* v. *San Diego & Arizona E. Ry.*, 382 U. S. 257 (1965) is completely dispositive of the question herein, and was in all respects followed by the District Court and the Court of Appeals herein.

*Gunther* involved a dispute in which the carrier removed an engineer from his employment for alleged physical disability. The carrier's action in removing Gunther was based upon reports by its physician that Gunther was no longer physically qualified to work as a locomotive engineer because, as the carrier put it, his "heart was in such condition that he would be likely to suffer an acute coronary episode." 198 F. Supp. 402, 405 (S.D. Calif. 1961). After removal from service, Gunther had an examination by his own physician—a "specialist"—who concluded that he was physically qualified to continue work. Based on this difference of "opinion," Gunther requested the carrier to select a three-doctor board for re-examination of his physical adequacy, and the carrier refused. Gunther then filed a claim for reinstatement and back pay with the Railroad Adjustment Board. The Board took jurisdiction (over the protest of the carrier), relied on past practice, and proceeded to appoint a committee of three physicians to re-examine Gunther. The panel of physicians rendered a majority decision that Gunther was physically qualified to continue work. On the basis of this finding, the Railroad Adjustment Board found Gunther to have been wrongfully discharged and ordered his reinstatement with back pay. The carrier refused to comply with the Board's order.

Gunther then petitioned in federal district court for an order enforcing the Railroad Adjustment Board's award.

On a motion for summary judgment by the carrier, the district court held the award erroneous and refused to enforce it. 198 F. Supp. 402 (S.D. Calif. 1961). Its holding was based upon the conclusion that the collective bargaining agreement between the Brotherhood of Locomotive Engineers and the carrier did not limit the "right" of the carrier to remove Gunther from active service because of physical disability. The district court made a lengthy examination of the collective bargaining agreement and concluded that:

> "The carrier here exercised a right which it had not surrendered by the act of executing a collective bargaining agreement, or by virtue of its terms." 198 F. Supp. at 418.

The Court of Appeals of the Ninth Circuit affirmed. 336 F. 2d 543 (1965). After indicating that the responsibility for physical competence must rest with the carrier, the court stated:

> "In our judgment, the Board exceeded its jurisdiction. It dealt with a dispute entirely foreign to the collective bargaining contract or to any question of interpretation arising under it." 336 F. 2d at 547.

Both the district court and the court of appeals ruled that the issues in the enforcement proceedings were to be tried *de novo*. The district court, using Petitioner's present reasoning, said:

> "When the award is unfavorable to the employee, the Board's decision is final * * * [citing cases]. When it is unfavorable to the carrier, the decision may not be enforced except as to the court orders, after an enforcement suit is brought by the employee. The Court hears the case *de novo* and may

> enforce or set aside the Board's decision." 198 F. Supp. 407, n. 3.

See also 198 F. Supp. 410, n. 7. The court of appeals said:

> "Appellant contends that the determination of this dispute by the Adjustment Board and its decision to entertain the dispute should be accepted by this Court under the arbitration-encouraging rules laid down in the [Steelworker] cases * * * and decisions of like import.
>
> "We do not find that line of authority in point. Those cases arose under §301 of the Labor Management Relations Act * * * and dealt with arbitration provisions of collective bargaining agreements." 336 F. 2d at 547-48.

The court of appeals then reasoned that since the proceeding arose under the Railway Labor Act,

> "It would seem apparent that Congress intended that courts should have full power to review the question whether a dispute as defined by Congress (rather than by the parties themselves) exists." 336 F. 2d at 548.

On certiorari, this Court reversed both courts and remanded. In Part III of the opinion this Court deals directly with the issue involved in the present case and in the clearest possible language totally and completely rejects the contention accepted by the lower courts and presently urged by the Petitioner herein. This Court first defined the question of the scope of review to be exercised by the lower court on remand and clearly indicated that non-money awards are governed by §153, First (m):

> "Section 3 First (m) provides that Adjustment Board awards 'shall be final and binding upon both parties to the dispute, except insofar as they shall

> contain a money award.' The award of the Board in this case, based on central findings that petitioner was wrongfully removed from service is two-fold, consisting both of an order of reinstatement and the money award for lost earnings. *Thus there arises the question of whether the District Court may open up the Board's finding on the merits that the railroad wrongfully removed petitioner from his job* merely because one part of the Board's order contained a money award." [Emphasis supplied.] 382 U. S. at 263.

In four words, this Court established without qualification the applicable rule of law that governs the present case:

> *"We hold it cannot."* [Emphasis supplied.] *Ibid.*

It is difficult to visualize the language which would convince Petitioner that this Court seriously meant to prevent relitigation of the non-money award in federal court. "We hold it cannot" is not inadvertent. It is not dictum. It is certainly not unintended. This Court, in strong, precise and uncompromising language, stated exactly what it meant to say. It emphatically laid to rest any doubt as to its interpretation of the finality of non-money awards under the Act:

> "The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal district court to review an Adjustment Board's determination of the merits of a grievance merely because a part of the Board's award, growing from its determination on the merits, is a money award. *The basic grievance here*—that is, the complaint that petitioner has been wrongfully removed from active service as an engineer because of health—*has been finally, completely and irrevocably settled by the Adjustment Board's*

> *decision. Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the "District Court."* [Emphasis supplied.] 382 U. S. at 264.

As in *Gunther,* the "basic grievance" in the present litigation is that the employees have "been wrongfully removed from active service." As in *Gunther,* the System Adjustment Board in the present case found them to be wrongfully discharged and ordered reinstatement with back pay. As in the *Gunther* case, the carrier refused to comply with the awards, and enforcement proceedings were commenced in federal court under §153, First (p). As in *Gunther,* the employees' rights to reinstatement "[have] been *finally, completely and irrevocably* settled by the Adjustment Board's decision." The District Court was unquestionably correct in its conclusion that:

> "The factual differences between Gunther and the instant proceeding do not suggest that there should be any different interpretation of the Act" (R. 69).

Respondents agree with the District Court that the *Gunther* case is dispositive of the issue and that it had "no alternative but to follow the teachings of *Gunther*" (R. 69).

Petitioner's only attempt to distinguish *Gunther* is its assertion that *Gunther* involved "contract interpretation" rather than an "issue of fact" (Petition 33). This analysis is faulty for two reasons:

(a) *Gunther* and the present case involve "contract interpretation" to an identical degree. The question in *Gunther* was whether the district court could review on the merits of the Board's determination that the company's dismissal of an employee on the ground that the likeli-

hood he would suffer a heart attack made him unfit for services as an engineer was unwarranted by the collective bargaining agreement; the question in the present case is whether the District Court could review on the merits the Board's determination that the Company's dismissal of an employee on the ground that his conduct in flying within 24 hours after consuming an alcoholic beverage (or in knowingly flying as a co-pilot with one who has committed such conduct) made him unfit for services as a pilot was unwarranted by the collective bargaining agreement. The only dissimilarity is that in *Gunther* the company's reason for dismissal was an engineer's susceptibility to heart attack, while in the instant case it is a pilot's conduct in flying within 24 hours after drinking (and a co-pilot's conduct in knowingly flying with one who has committed such conduct). If anything, it would seem that the company should be given more leeway in the former situation, since the asserted danger was physical and not capable of remedy, as opposed to the situation here, where it is past conduct, repetition of which can be prevented by disciplinary suspension (which the Board in fact provided, see R. 20 (Rall, 7 months), 24 (Lee, 2 months)).

Moreover, there was more a "fact" issue in *Gunther* than in the present case; in *Gunther,* it was disputed whether the employee had susceptibility to heart attack; in the instant case, there is no dispute as to the fact that the employees committed the conduct complained of, and the only question is whether such conduct under the circumstances warranted discharge.

(b) Even it if were true that the present case involves more "issue of fact" and less "contract interpretation" than *Gunther,* Petitioner certainly proposes a novel rule of

law when it contends that determinations of "fact" issues should be subjected to more intensive judicial review than "contract interpretations." If anything, the rule would be the contrary.

In fact, it is plain that neither *Gunther* nor the statute construed therein is grounded upon such considerations. Rather, *Gunther* holds that duly obtained Board findings and orders, regardless of the relative amounts of "fact" determination and "contract interpretation" involved, are final and binding upon the parties.

The matters put forth by Petitioner in avoidance of this obvious fact are completely without merit, but they will be examined in turn.

(1) *"Curiosities."* Petitioner asserts that *Gunther* yields several "curiosities" if it rejects *de novo* review.

(a) *Non-Use of Phrase "De Novo."* Petitioner seizes upon the fact that the *Gunther* opinion nowhere refers to the phrase *"de novo."* It is "curious" that Petitioner would require this Court to use that phrase in view of the fact that the Railway Labor Act under consideration does not employ it. Reading the opinion as a whole, there can be no doubt that regardless of phraseology, this Court intended to preclude *de novo* review. It is "curious" to attach significance to the non-use of the term *"de novo"* review in an opinion which specifically states that the district court may not "open up the Board's finding on the merits," that Congress intends to "foreclose litigation in the courts over grievances submitted to and disposed of by the Board," that the district court may not "review an Adjustment Board's determination of the merits of the grievance," that the grievances were "finally, completely and irrevocably settled by the Adjustment Board's decision," and that "the merits of the wrongful removal issue

as decided by the Adjustment Board must be accepted by the District Court." See 382 U. S. at 263, 264.

(b) *Failure to Refer to Certain Dissenting Opinions.* Petitioner claims that if this Court meant what it unequivocally said in *Gunther,* mention should have been made of certain dissenting opinions which it feels are inconsistent with the result in *Gunther;* thus, it urges that "Only this Court can tell whether those views are overruled in *Gunther* without any mention whatsoever," and that "Justice Black, speaking for this Court, has not changed his previous opinion in dissent." These claims are devoid of merit.

Perhaps if the result reached in *Gunther* had been opposed to the prior position of Justices Black and Douglas, as Petitioner erroneously suggests in referring to an "overruling" of the prior views and a "change" of opinion, there might be some reason to suppose that the dissenting opinions would have been cited. But the result in *Gunther* was not opposed to the prior position of either justice. In *Pennsylvania R. R.* v. *Day,* 360 U. S. 548 (1959), a retired railroad employee sued in federal district court for extra compensation he claimed was due under a collective bargaining agreement. The court stayed the proceedings pending the disposition of similar claims before the National Railroad Adjustment Board. The issue was whether the employee was entitled to proceed before the district court, bypassing the Adjustment Board. This Court held that he was not, as the Board had exclusive primary jurisdiction, notwithstanding the fact the employee was retired. Justice Black, joined by the Chief Justice and Justice Douglas, dissented on the grounds that a *retired* employee is not an "employee" within the meaning of the Labor Act provision requiring submission of disputes to the Board, and that the majority construc-

tion apparently resulted in an inequality between the position of the employee and that of the employer. Justice Black described the inequality as follows:

> "[W]hen the Board makes an award adverse to the railroad and the employee is forced to go to the courts to have the award enforced, courts *have felt free* to interpret collective bargaining agreements differently from the way the Board had. [Citing court of appeals cases.]
>
> * * * * *
>
> "[C]ourts, determining that a Board denial of the employee's money claim is not a 'money award' falling within the exception of §3 First (m), *have refused* workers a judicial trial of their *money claims* against the railway after these have been rejected by the Board. Today's decision in *Union Pacific R. Co.* v. *Price,* 360 U. S. 601, 3 L. Ed. 2d 1460, 79 S. Ct. 1351, appears to adopt this position. In contrast, however, a railroad may obtain a trial substantially de novo of any award adverse to it.
>
> * * * * *
>
> *"Construed this way,* the Act creates a glaring inequality of treatment between workers and railroads." [Emphasis supplied.] 360 U. S. 556-57, 558, 559.

In *Union Pacific R. R.* v. *Price,* 360 U. S. 601 (1959), this Court held that an employee could not pursue a common law remedy for damages from wrongful discharge after an adverse determination of the Adjustment Board. Justice Douglas, joined by the Chief Justice and Justice Black, dissented, noting the inequality of treatment in allowing an employer review of a *money award* and denying an employee review of an award of no damages.

> "Respondent argues that *it would be* grossly unfair to construe §3 First (m) so as to deny judicial review to a defeated employee but not to a defeated

> railroad. *That would indeed be the result* if an employee asserting a *money claim* cannot get court review if he loses, while the employer can obtain it if the employee wins. It is difficult for me to believe that Congress designed and approved such a lopsided, preferential system." [Emphasis supplied.] 360 U. S. 619.

All that the *Day* and *Price* dissents show is that the writers thereof considered it inequitable that *de novo* review be refused to the employee for denial of a *money claim* while it is granted to the employer for *money awards*. The holding of *Gunther*, that review of non-money awards denied to the employer as it is to the employee, is certainly not inconsistent.[8] Even if there were any inconsistency, the plain language used by Justice Black in *Gunther* should more than satisfy the Petitioner's "curiosity."

(c) *Failure to Cite Certain Lower Court Decisions.* Petitioner asserts as another "curiosity" that the *Gunther* opinion fails to mention "the overwhelming number of decisions which uniformly hold that a trial *de novo* is required in an NRAB enforcement proceeding" (Petition 28). In the first place, even if there were an "overwhelming" number of lower court decisions requiring trial *de novo*, there is no reason why this Court would have had to refer to them in light of the plain and concise language of *Gunther*. But there is no such "overwhelming" number of decisions. Page 17, note 15, of the petition sets forth sixteen cases which Petitioner claims "have held that NRAB enforcement suits proceed *de novo*." An examina-

8. It should be noted that Justice Black felt that certiorari should have been granted in an earlier case allowing *de novo* review of a non-money award. See *Brotherhood of R. R. Trainmen* v. *Louisville & Nashville R.R.*, 334 F. 2d 79 (5th Cir. 1964), *cert. den.* 379 U. S. 934 (1964). He also favored granting the petition for rehearing. *Id.* 379 U. S. 986 (1965).

tion of these cases reveals that in two of them the question of *de novo* review was in no way involved. *Hodges* v. *Atlantic C.L.R.R.*, 310 F. 2d 438 (5th Cir. 1962) (reversed dismissal of suit to enforce award, which dismissal was on grounds award was not sufficiently definite); *Kirby* v. *Pennsylvania R.R.*, 188 F. 2d 793 (3d Cir. 1951) (same). Two other cases contain absolutely no holding as to *de novo* review, but do contain dicta as to that matter. *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, *affirmed by an equally divided court*, 319 U. S. 732 (1943) (employer may not maintain suit for declaratory judgment of rights under collective bargaining agreement during two years allowed for employee's enforcement suit); *Order of Railroad Telegraphers* v. *Union Pacific R.R.*, 231 F. Supp. 33 (D. Colo. 1964) (employees in favor of whom award was made are indispensible parties to union's suit to enforce award). In three cases, the courts did require a *de novo hearing*, but that action was not a crucial holding in light of the fact that the court in each case ruled that the employee seeking enforcement of the award was entitled to all benefits conferred by the award. *Ward* v. *New Orleans Public Belt R.R. Commn.*, 97 F. Supp. 1002 (E.D. La. 1951), *affirmed*, 195 F. 2d 829 (5th Cir. 1952); *Crist* v. *Public Belt R.R. Commn.*, 93 F. Supp. 103 (E.D. La. 1950); *Hanks* v. *Delaware & H. R. Corp.*, 63 F. Supp. 161 (N.D.N.Y. 1945). In another case, the ruling was made in a pre-trial order, so that it is not apparent whether the employees received all the benefits sought. *Order of Sleeping Car Conductors* v. *Pullman Co.*, 47 F. Supp. 599 (E.D. Wis. 1942). In three other cases, judgments in favor of railroads were affirmed, but not on the basis of the type of review claimed by Petitioner. *Jones* v. *Central of Georgia Ry.*, 331 F. 2d 649 (5th Cir. 1964) (employee estopped to proceed before Board for reinstatement with back pay

because he had previously recovered in state court for past, present and future wages from railroad on ground he was permanently disabled and unable to work in his employment); *Callan* v. *Great Northern Ry.*, 299 F. 2d 908 (9th Cir. 1961) (involved question whether award was obtained through fraud); *Boos* v. *Railway Express Agency*, 253 F. 2d 896 (8th Cir. 1958) (affirmed summary judgment—court specifically stated there was no issue as to effect to be given findings and order of Adjustment Board). Only five cases appear to involve the type of review sought by Petitioner. *Brotherhood of R.R. Trainmen* v. *Louisville & N.R.R.*, 334 F. 2d 79 (5th Cir. 1964), *cert. den.* 379 U. S. 934 (1964); *Brotherhood of Railway Clerks* v. *Atlantic Coast Line R.R.*, 253 F. 2d 753 (4th Cir. 1958); *Thomas* v. *New York, C. & St. L. R.R.*, 185 F. 2d 614 (6th Cir. 1950); *Dahlberg* v. *Pittsburg & L.E. R.R.*, 138 F. 2d 121 (3d Cir. 1943); *Hanson* v. *Chesapeake & O. Ry.*, 236 F. Supp. 56 (S.D. W. Va. 1964). For some reason, Petitioner has neglected to include in its citation to the last-mentioned case the very significant subsequent history. After affirmance by the Court of Appeals for the Fourth Circuit, 351 F. 2d 953, the case was summarily vacated and remanded for "further consideration in light of *Gunther* v. *San Diego & A.E.R. Co.*," 384 U. S. 211 (1966). On remand, 367 F. 2d 134 (4th Cir. 1966), the Court of Appeals without hesitation adopted precisely the same approach as the District Court and the Court of Appeals in the present case.

(d) *Failure of Gunther Parties to Argue Point.* Petitioner makes much of the fact that the employee in *Gunther* did not assert that the carrier was not entitled to *de novo* review. It is well established that this Court may decide a case upon a ground not put forth by the parties,

see *Erie R.R.* v. *Tompkins,* 304 U. S. 64 (1938), and the *Gunther* opinion makes very clear the ground upon which the case was decided. As Petitioner concedes, the issue was raised in an *amicus* brief, and the issue (and many of the relevant cases) was discussed in the *Gunther* district court and court of appeals opinions. See 198 F. Supp. at 407 nn. 3, 4, 410 n. 7; 336 F. 2d at 547-48.

(2) *Cases Cited in Gunther.*

The argument in Petition 30-33 is apparently premised upon the belief that *Gunther* cannot foreclose *de novo* review because prior decisions of this Court cited in the opinion do not do so. Petitioner overlooks, however, the fact that *Gunther* was the first case before this Court which sought enforcement of an award under Section 153, First (p.) With the precise issue before this Court for the first time, it is not surprising that the cases cited are amenable to distinction. Regardless of those prior cases, *Gunther* holds judicial review of the type Petitioner seeks to be prohibited, and that holding, even were it standing without any prior judicial support, would be completely effective.

(3) *Terms of the Statute.*

Contrary to Petitioner's assertion, the decisions of the courts herein are completely in accord with the governing statute, both as it existed before the recent amendment, and since. The purpose of the statute, with regard to "minor" disputes of the type involved here, is to "provide for the prompt and orderly setlement" thereof, Railway Labor Act, §2, 44 Stat. 577 (1926), 45 U.S.C., §151a.

Before amendment, §3, First (m) provided that the Board's awards "shall be final and binding upon both parties to a dispute, except insofar as they shall contain a

money award." Section 3, First (p)'s provision that the Board's findings and order "shall be prima facie evidence of the facts therein stated, which provision is the only real basis for all of Petitioner's contentions, applied only to the issue of "the size of the money award." *Gunther* v. *San Diego & A. E. Ry.*, 382 U.S. 257, 264.

(4) *Subsequent amendment of Section 3, First.*

Petitioner argues that the recent amendment of §3, First (80 Stat. 208 (1966)), eliminating the paragraph (m) exception relating to money awards and changing the paragraph (p) phrase "shall be prima facie evidence of the facts therein stated" to "shall be conclusive on the parties" shows that the provisions before amendment required *de novo* review of non-money awards, because of the rule of statutory construction that Congress, in adopting an amendment, intended to make some change in existing law. This assertion compels the conclusion that Petitioner has misread the amendment or *Gunther*, or both. The *Gunther* decision denied judicial review to enforcement proceedings involving "non-money" awards and does not purport to eliminate review in cases of money awards. The amendment does not purport to effect non-money awards, but instead eliminates the distinction between non-money and money awards and makes both classes of awards final and conclusive in enforcement proceedings. This Congressional action, therefore, in no way impinges upon *Gunther's* effect on the present case.

Moreover, Petitioner's argument places it in a dilemma. If the amendment *did* change the law, i.e., *if it was* the amendment rather than *Gunther* which for the first time made non-money awards unreviewable, then the statute, in that it deals with federal court jurisdiction, would have effect in this case to prevent the courts from making a *de*

*novo* determination as to the award, notwithstanding the fact that the amendment was intervening. See *Brotherhood of R.R. Trainmen* v. *Denver & R.G.W.R.R.*, 370 F. 2d 833 (10th Cir. 1966).

(5) *Seventh Amendment.*

Petitioner's final assertion as to why *Gunther* does not mean what it says is that if it did, it would be a denial of the employer's right to a jury trial. Petitioner cannot be serious about this. For all of the following reasons, the contention is totally without merit:

(a) Petitioner expressly waived its right to a trial by jury by agreeing to have minor disputes settled by Board decision, which was to be "final, binding and conclusive." (See R. 9; Court of Appeals opinion, Petition Appendix A 46).

(b) Actions to enforce awards of the type involved here were unknown to the common law. Court of Appeals opinion, Petition Appendix A 46; see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936); *Brady* v. *Transworld Airlines, Inc.*, 196 F. Supp. 504 (D. Del. 1961).

(c) The suit herein is one for equitable relief (as Petitioner admits in Petition 24), in which the recovery of money is a mere incident. In such cases there is no right to a jury trial. *NLRB* v. *Jones & Laughlin Steel Corp., supra.* The right has not been "abrogated" (Petition 24)—it never existed. The cases cited by Petitioner holding that a separate issue of damages must be tried by a jury are clearly distinguishable—an action for damages is at law.

**3. (b) The question herein is not an important question of federal law.**

Because of the amendments to §153, First, which were just discussed, it can certainly not be said that the question involved herein is an important question of federal law. Even assuming for the briefest moment that there is some merit to Petitioner's contention that *Gunther* did not bar *de novo* review of the type it seeks, still it is clear that such review is not permissible now that Congress has enacted the amendments to §3. As presently worded, §3, First (m) provides that "the award shall be final and binding upon both parties to the dispute," and §3, First (p) that an enforcement suit "the findings and order of the division of the Adjustment Board shall be conclusive on the parties." So, even if there were a substantial federal question before these amendments, there certainly is none now.

**3. (c) The question herein need not and should not be treated by this Court at this time.**

Even if Petitioner's unlikely contention that there is some ambiguity in *Gunther* were true as an abstract matter, it is abundantly clear that the federal courts considering *Gunther* have had no difficulty in understanding it. Since those courts are of a single mind as to the meaning of *Gunther,* (see discussion at §2, *supra*), it certainly appears neither necessary or desirable that this Court again address itself to the issue.

**4. There is presently no conflict between any Courts of Appeal as to the federal question herein.**

As noted above, (see §2, *supra*), there is unanimity in the decisions considering the effect of *Gunther.*

## Conclusion

Respondents respectfully submit that Petitioner has shown no grounds justifying the grant of a writ of certiorari to the Court of Appeals for the Eighth Circuit. The Court of Appeals decision was not decided in conflict with the applicable decisions of this Court; on the contrary, it followed them. Nor is there presently any conflict among the circuits as to the question here involved. Moreover, if there were any legitimate doubt as to the question, the amendment of the underlying statute completely removes it. Petitioner appears to be the only one who is "confused" and "curious" about the question, and this Court's writ of certiorari was never intended to satisfy such individual confusion and curiosity.

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